

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EVERETT E. BRAY)	
Claimant)	
VS.)	
)	
VALENT AEROSTRUCTURES, LLC)	Docket No. 1,066,529
Respondent)	
AND)	
)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the May 13, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Jeffrey D. Slattery of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 5, 2014, preliminary hearing and exhibits thereto; the April 24, 2014, notes of Dr. John W. Weigel; and all pleadings contained in the administrative file.

ISSUES

At the preliminary hearing, claimant sought medical treatment for an accidental injury. The ALJ denied claimant's request, stating:

Claimant's preliminary hearing requests are **CONSIDERED** and **DENIED**. Claimant has failed to establish that the work-related accident was the prevailing factor in causing Claimant's injury, medical condition or disability. The court interprets Dr. Weigel's IME report to state that Claimant's previous epididymectomy is the prevailing factor in his current diagnosis and need for treatment.¹

¹ ALJ Order (May 13, 2014) at 1.

Claimant appeals and asserts his work accident was the prevailing factor causing his injury and need for medical treatment, not his preexisting epididymectomy. Respondent asks the Board to affirm the preliminary hearing Order.

The issue before the Board is: did claimant prove his personal injury by accident arose out of and in the course of his employment with respondent? Specifically, did claimant prove by a preponderance of the evidence that his work accident was the prevailing factor causing his injury and need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was a machine operator for respondent and he worked the 6 p.m. to 6:30 a.m. shift. On July 23, 2013, claimant was using an air wand to blow metal shavings from a part in the machine. The metal air wand is attached to a pressurized air hose. As claimant was holding the air wand, the air nozzle and clamp flew off. The air nozzle and clamp or the pressurized air hose struck claimant's left testicle. He felt immediate severe pain. Claimant likened it to being hit by someone throwing a baseball. Claimant went home, where he put ice on the injured body part, elevated it and took a pain pill.

The next day, claimant called his doctor, who called respondent for authorization, which was denied. Mandy Lantz, human resources manager for respondent, instead authorized claimant to see a nurse practitioner, Jessica L. Evans, in Fredonia. When claimant saw Ms. Evans, his left testicle was swollen. Ms. Evans ordered a urine sample. The sample had blood in it. Claimant was sent home and told to elevate the injured body part, apply an ice pack and take 800 milligrams of ibuprofen. After claimant got home, he received a call from Ms. Lantz indicating he was released by Ms. Evans to light duty and needed to report to work the same night. Claimant told Ms. Lantz he was hurting too badly and would be in the following night. On July 25, claimant went to work and worked until 12:30 a.m., when he went home because the pain was unbearable.

On July 26, claimant saw Ms. Evans, who sent claimant to Chanute for a scrotal and testicular sonogram. The sonogram revealed there was normal blood flow evident in each testis, the testicular parenchyma was normal and homogenous, there were no masses and the epididymal structures were normal. No hematoma or testicular fracture was noted. In notes from a July 29 appointment, Ms. Evans indicated current findings did not suggest any acute trauma was caused by claimant's work accident. Ms. Evans told claimant to see his urologist as soon as possible.

Claimant saw Dr. J. Jason Robinson, a urologist, who previously treated claimant for prostate cancer. Claimant testified Dr. Robinson provided him with restrictions for two weeks to see if claimant could handle working. At the end of the two-week period, claimant

was still having pain and was terminated. Claimant testified he was still being treated by Dr. Robinson. According to claimant, Dr. Robinson recommended removal of the left testicle. Claimant testified he was still having sharp, stabbing, constant pain going from his left testicle into the groin.

Claimant testified he was diagnosed with prostate cancer in July 2012. At that time, he had no testicular pain, nor problems urinating or defecating. He had his cholesterol tested just prior to July 4, 2012, and learned his PSA was high. The test was repeated and his PSA was again high. In August 2012, claimant underwent cryoablation, where the cancer cells are destroyed with extreme cold. Claimant testified that after his catheter was removed, he developed a bad bladder infection that went into his blood system and affected his bones. In November 2012, claimant was hospitalized for four and one-half days. Claimant indicated the infection had nothing to do with his testicles.

The epididymis (a structure located inside the scrotum) of claimant's left testicle became infected and antibiotics did not relieve the infection. Claimant testified his only symptom was a dull pain and he had no problems urinating. The epididymis was surgically removed in December 2012 in a procedure known as an epididymectomy. Following the surgery, the dull pain went away. After recovering from the surgery, claimant returned to work and had fatigue from the cancer. He had his PSA checked every two months. Claimant admitted he reported swelling and pain in his left testicle and groin to Dr. Robinson in February 2013 and reported blood in his urine in March 2013.

In May 2013, a doctor determined claimant had a heart valve that was not closing properly and he was placed on Atenolol. He was also taking Flomax to help him urinate. Claimant testified he was advised not to take Flomax, as both drugs lower blood pressure. Claimant explained that after his prostate cancer treatment, he was advised to measure his urine output every day. After being taken off Flomax, claimant's urine output decreased and on July 10, 2013, his bladder and testicles hurt at work. Claimant went home and called a licensed practitioner in Neodesha who advised it was okay to take Flomax. Claimant did so and was able to urinate again. After urinating a large volume, claimant's pain dissipated. Claimant indicated he remained pain free until the July 23, 2013, accident.

As indicated above, claimant learned he had prostate cancer in July 2012 and was treated by Dr. Robinson. Only Dr. Robinson's notes from Ashley Clinic commencing December 12, 2012, were placed into evidence. The December 12, 2012, visit was a one-week followup from epididymitis. The doctor's note indicated claimant was on antibiotics for several weeks and had continued pain in the left testicle with no relief. January 9, 2013, notes from Ashley Clinic indicate claimant underwent an epididymectomy on December 18, 2012. Notes from claimant's February 7 and March 28, 2013, visits indicated claimant complained of left testicular pain. On June 12, 2013, claimant reported having some left testicular pain, but it was better than before. The notes from that visit also

state, "He had chronic problems with epididymitis and had some multiple infections but finally it resolved. He is having no issues now."²

The next Ashley Clinic note, from July 31, 2013, indicated claimant was struck in the left testicle at work on July 23, 2013, and had left testicular pain. The note indicated that prior to that, claimant felt so good he was dancing a jig at work. The note also indicated he had no pain, but now things had all essentially started over. A scrotal ultrasound demonstrated no obvious rupture, just some swelling. Dr. Robinson indicated he could detect no abnormalities other than some mild epididymal fullness and tenderness on the left side. Claimant asked for an orchiectomy (removal of the testicle) on the left side because of being tired of the pain, but the doctor first wanted to try conservative treatment.

On August 14, 2013, claimant saw Dr. Robinson and complained of persistent left testicular pain. The doctor noted claimant did well until the accident at work. Dr. Robinson stated, "I suspect he has chronic orch[i]algia and it may end up coming to an epididymectomy or orchiectomy surgery. Etiology is unclear. I am not sure that one can determine whether or not this is a chronic situation or that this is completely caused by the air hose incident as he has had some chronic discomfort"³ Claimant saw Dr. Robinson several more times through February 2014, each time complaining of left testicular pain.

For the period from August 2012 through July 11, 2013, respondent introduced emails from claimant's supervisors, Jesse Eaks and John Ellis; time-off requests from claimant and notes from physicians concerning claimant's work status. A time-off request completed by claimant on July 10, 2013, requested he be off the next day because he was "having trouble going to pee hurting in bladder and left nut."⁴ Mr. Eaks testified about claimant missing work because of prostate cancer. On cross-examination, Mr. Eaks acknowledged some of the time that claimant missed work was for his heart condition.

Claimant was evaluated at the request of his counsel by Dr. George G. Flutter on November 13, 2013. The doctor reviewed medical records from Dr. Morris, Hill Medical Clinic and Ms. Evans from July 24 through 29, 2013; and Dr. Robinson's records from July 31 through August 14, 2013. Dr. Flutter's November 13, 2013, report indicates he also reviewed the report of claimant's July 26, 2013, scrotal and testicular sonogram. Dr. Flutter indicated claimant reported having no prior injuries to or problems with his testicles. Claimant did disclose he had prostate cancer and had undergone cryoablation in August 2012 and a left epididymectomy. According to Dr. Flutter, claimant reported having no testicular pain associated with cancer or epididymitis, but had some epididymal

² P.H. Trans., Resp. Ex. A.

³ *Id.*

⁴ *Id.*, Resp. Ex. C.

tenderness when the epididymitis was diagnosed. Dr. Fluter assessed claimant with status post work-related injury on July 23, 2013, and testicular trauma with intractable pain. The doctor opined the prevailing factor for claimant's injury and need for medical evaluation/treatment was the July 23, 2013, work-related injury. He recommended several treatment options.

At respondent's request, claimant was evaluated by Dr. Chris D. Fevurly on January 16, 2014. The doctor noted claimant had cryoablation on August 21, 2012, and a left epididymectomy on December 18, 2012. The doctor listed claimant's chronic medical conditions, including claimant's prostate cancer. Dr. Fevurly indicated claimant denied ongoing testicular pain associated with the prostate cancer or the epididymitis, but noted Dr. Robinson reported chronic testicular discomfort due to the prior episode of epididymitis, which had been treated and resolved prior to the July 23, 2013, work event. Dr. Fevurly noted claimant indicated "'things were going well'"⁵ to Dr. Robinson on June 12, 2013.

From Dr. Fevurly's report, it appears he reviewed medical records from Drs. Robinson, Fluter and Gupta and Ms. Evans. With a few exceptions, Dr. Fevurly's report did not specifically list the medical records or the dates of the medical records he reviewed. Dr. Fevurly's assessments were blunt trauma to the testes and left hemiscrotum, no abnormality on scrotal ultrasound, and recurrent left testis and inguinal pain without other abnormality noted on examination, which Dr. Fevurly noted may represent traumatic orchitis. With regard to prevailing factor, Dr. Fevurly opined:

The diagnosis of traumatic orchitis is consistent with the original mechanism of injury sustained on July 23, 2013 and is the prevailing factor. The prior history of prostate cancer should not have delayed healing from this injury. The cause of his chronic (and current) pain is not readily apparent but scientific literature reports significant contribution to the development of chronic pain from underlying psychosocial, behavioral and environmental factors.⁶

Following the testimony of the witnesses, the ALJ indicated he had several concerns that needed to be addressed. First, the ALJ indicated he could not award benefits unless there was a change in the physical structure of claimant's body and no one could find any, other than swelling. The second concern was whether claimant's pain was caused primarily by the work accident or by chronic conditions he had before the work accident. The ALJ indicated Dr. Robinson's records did not offer an opinion on that issue. The ALJ stated Dr. Fluter did not have all of claimant's prior medical records and noted Dr. Fluter believed claimant was asymptomatic prior to July 23, 2013. Claimant then placed Dr. Fevurly's report into the record.

⁵ *Id.*, Cl. Ex. 2 at 3.

⁶ *Id.*, Cl. Ex. 2 at 7.

The ALJ found claimant sustained an accident on July 23, 2013, that arose out of and in the course of his employment with respondent and indicated the issue was whether there was personal injury by accident or prevailing factor. The ALJ indicated to the parties he was going to appoint a neutral physician, a urologist, to evaluate claimant and prepare an independent medical evaluation (IME) report. Ultimately, the ALJ appointed Dr. John W. Weigel to evaluate claimant. The ALJ told the parties they would have seven days after receiving the IME report to submit comments to him.

The ALJ's March 13, 2014, Order asked Dr. Weigel to offer opinions on diagnosis, recommendations for treatment and whether claimant's July 23, 2013, accident was the prevailing factor causing claimant's injury, need for treatment or resulting impairment or disability, if any. A letter from the ALJ to Dr. Weigel indicated counsel for the parties would provide the doctor with relevant medical records. The letter also indicated claimant was being referred for an examination and opinions on diagnosis, recommendations for treatment and prevailing factor, but gives no explanation of the term "prevailing factor." The letter from the parties to Dr. Weigel that presumably accompanied the medical records is not in the record.

Dr. Weigel examined claimant on April 23, 2014. The doctor did not prepare a report, but rather prepared progress notes, which were sent to ALJ Moore. The notes were received by the Division on May 6, 2014. On May 13, 2014, without further hearing, the ALJ issued the preliminary hearing Order denying claimant's request for medical treatment. Apparently, the progress notes were sent to the ALJ, but not the parties, as claimant's counsel alleged the first notice he received of Dr. Weigel's notes was when he received the May 13, 2014, preliminary hearing Order.

Dr. Weigel's notes indicate claimant was seen by Dr. Robinson, but do not mention records from any other physician. Dr. Weigel noted claimant reported he did well, was able to work and was symptom free after his cryotherapy and epididymectomy. However, after the incident with the air wand, claimant had ongoing pain and tenderness. The doctor's examination revealed claimant's right intrascrotal contents appeared to be normal. On the left, claimant's testis was tender and there was an absence of an epididymis. The doctor could not feel any masses. Dr. Weigel stated:

I discussed his situation with him and would summarize his current problem as chronic, fairly severe left orchialgia. Having had an epididymectomy makes him more vulnerable to testicular pain because of back pressure and congestion.⁷

Dr. Weigel recommended a spermatic cord block to determine whether it relieved claimant's pain. If it provided significant relief, Dr. Weigel recommended two options for

⁷ Weigel IME progress notes at 1.

treatment of claimant's condition – a microdissection of the spermatic cord with excision of the pain fibers or a left orchidectomy with division of the spermatic cord.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”⁹

K.S.A. 2013 Supp. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

This Board Member agrees with the ALJ's assessment that Dr. Flutter's evaluation is lacking because the doctor did not have claimant's complete medical records. The doctor's report indicated he had claimant's medical records commencing with July 24, 2013, or after claimant's work accident. Dr. Flutter relied on claimant to provide an accurate medical history prior to his work accident.

⁸ K.S.A. 2013 Supp. 44-501b(c).

⁹ K.S.A. 2013 Supp. 44-508(h).

Dr. Fevurly's IME report is eight pages and contains detailed information about claimant's medical condition prior to his work accident. The doctor was aware of claimant's post-operative complication of epididymitis that required an epididymectomy and the fact claimant had chronic testicular discomfort due to the prior episode of epididymitis, which had been treated and resolved prior to the July 23, 2013, work event.

Unlike the ALJ, this Board Member does not interpret Dr. Weigel's notes to state claimant's previous epididymectomy was the prevailing factor for his current diagnosis and need for medical treatment. Dr. Weigel gave no prevailing factor opinion and it is uncertain if the doctor was familiar with the term "prevailing factor" as set forth in the Kansas Workers Compensation Act. Moreover, Dr. Weigel indicated claimant reported doing well and being able to work prior to the July 23, 2013, accident.

Dr. Fevurly's prevailing factor opinion is more credible than that of Dr. Fluter, although both of them rendered the same opinion. Drs. Robinson and Weigel provided no prevailing factor opinion. The credible medical evidence supports claimant's assertion his accident was the prevailing factor causing his current condition and need for medical treatment.

In addition to medical evidence, claimant's testimony and statements support his position on prevailing factor. Claimant testified and told Drs. Robinson, Fevurly, Fluter and Weigel he was feeling well immediately before the July 23, 2013, work injury. Claimant had some discomfort in his left testicle and bladder around July 10, 2013, which was less than two weeks prior to his work accident. However, that was caused by being taken off Flomax.

It is undisputed claimant was struck in the left testicle by an air nozzle and clamp or an air hose traveling at a high rate of speed, causing his left testicle to swell. Swelling is a change in the physical structure of claimant's body. This Board Member finds claimant proved his accident was the prevailing factor causing his current injury and need for medical treatment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

¹⁰ K.S.A. 2013 Supp. 44-534a.

¹¹ K.S.A. 2013 Supp. 44-555c(j).

WHEREFORE, the undersigned Board Member reverses the May 13, 2014, preliminary hearing Order entered by ALJ Moore, by finding claimant proved he sustained personal injury by accident arising out of and in the course of his employment with respondent. This matter is remanded to the ALJ to issue orders consistent with the Board's findings.

IT IS SO ORDERED.

Dated this ____ day of August, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Bruce E. Moore, Administrative Law Judge